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In the Supreme Court of the United States

October Term, 1994

C. BRENT SCOTT, et al.
Petitioners

v.

JOEL KRISSMAN, et al.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, under the Due Process Clauses of the Fifth and Fourteenth Amendments, state laws and procedures may constitutionally authorize a trial judge to impose substantial punitive sanctions on an attorney for proceeding to trial on a lawsuit, even though the lawsuit had previously survived motions for summary judgment before different judges who made judicial findings that numerous triable issues of fact existed, and even though the evidence at trial substantially conformed to the evidence previously presented to the motions judges?

2. Whether, before imposing substantial punitive attorney sanctions, a trial judge's refusal to hold an evidentiary hearing or a jury trial at which the attorney can present witnesses and cross-examine the sources of hearsay declarations against him, violates the attorney's constitutional rights to due process of law and to a jury trial?

LIST OF PARTIES

The parties to the proceedings below were the petitioners C. Brent Scott, an individual, and the Law Offices of C. Brent Scott, a Professional Corporation, as well as the respondents Joel Krissman, an individual, and Silver, McWilliams, Stolpman, Mandel & Katzman, a Law Partnership.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

Petitioners C. Brent Scott, an individual, and the Law Offices of C. Brent Scott, a Professional Corporation, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of California, Fourth Appellate District, Division Three, entered on December 28, 1993.

OPINIONS BELOW

The decision of the Court of Appeal of California, Fourth Appellate District, Division Three is reproduced at A.2.[1] The order of the Court of Appeal of California, Fourth Appellate District, Division Three, denying petition for rehearing is reproduced at A.40. The order of the Supreme Court of California denying petition for review is reproduced at A.41. A letter of the Special Investigator of the State Bar of California to Petitioner is reproduced at A.42. The orders denying defendants' motions for summary judgment

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[1]The Appendix attached hereto is cited as "A. ." The Record Transcript is cited herein as "(R.)." The Appendix to the Appellant's Brief before the California Court of Appeal is cited herein as "(AA.)."

are reproduced at A.44 and at A.54. The order of the trial judge imposing sanctions pursuant to Cal. Code Civ. Proc. § 128.5 is reproduced at A.58.

JURISDICTION OF THIS COURT

This Court has jurisdiction under 28 U.S.C. § 1257(a)(1988) to review the judgment of the Court of Appeal of California, which was entered on December 28, 1993. Petitioner's petition for review was timely filed and was denied by the California Supreme Court on April 20, 1994.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V provides, in pertinent part: "No person shall be ... deprived of life, liberty or property, without due process of law ...."

U.S. Const. amend. VII provides, in pertinent part: " ... In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ...."

U.S. Const. amend. XIV, § 1 provides, in pertinent part: "... nor shall any state deprive any person of life, liberty or property, without due process of law ...."

Cal. Code Civ. Proc. § 437c (1994) provides, in pertinent part: "(a) Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit .... (b) The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken .... The opposition, where appropriate, shall consist of affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken .... (c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law .... (g) Upon the denial of a motion for summary judgment, on the ground that there is a triable issue as to one or more material facts, the court

shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion which indicates that a triable controversy exists ...."

Cal. Code Civ. Proc. § 581c (1994) provides: "(a) After the plaintiff has completed his or her opening statement, or the presentation of his or her evidence in a trial by jury, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a judgment of nonsuit .... (c) If the motion is granted, unless the court in its order for judgment otherwise specifies, the judgment of nonsuit operates as an adjudication on the merits."

Cal. Code Civ. Proc. § 128.5 (1994) provides, in pertinent part: "(a) Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay .... (b) For purposes of this section ... (2) Frivolous means (A) totally and completely without merit or (B) for the sole purpose of harassing an

opposing party .... (c) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or in the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order ...."

STATEMENT OF THE CASE

Petitioner-plaintiff Attorney C. Brent Scott filed a complaint against Attorney Joel C. Krissman and his law firm for tortious interference with contract, disparagement and defamation for Krissman's efforts to steal a client of plaintiff's, a thirty-five year old man who had been severely injured in a work-related industrial explosion (AA. 25-31; R. 44-48, 72-76). As the Court of Appeal ultimately found, defendant Krissman telephoned a

client of plaintiff's even though he knew the client had retained plaintiff, bragged that his own firm had "experience ... handling industrial accident litigation" and could do a better job than plaintiff, and warned the client that plaintiff "had never handled a case as big as [this] before" (A.9; R. 57, 126, 260, 397-398, 621). Defendant also told client's union business manager that plaintiff had never tried a civil lawsuit before, although, according to evidence presented at the trial, plaintiff had, in fact, tried several (R. 57-59, 63, 82, 126-127, 131, 163-165, 172, 183, 397-398, 775-776). It was undisputed that Krissman's telephone call to plaintiff's client was ratified by

the managing partner of Krissman's firm (R. 335-336, 570).

As a result of defendants' efforts, plaintiff spent substantial time, energy, and money to retain the client's business, before obtaining for the client a settlement of $5.2 million (A.11; R. 598-599).[2] There was evidence that plaintiff filed the instant lawsuit in the good faith belief that defendants had committed the torts alleged, that they had violated provisions of the California Rules of Professional Conduct banning solicitation, and that they would continue to do so in the future if this lawsuit was not filed

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[2]Plaintiff calculated his costs to retain his clients as having been well in excess of $80,000 (R. 669-670).

(R. 622-623, 661-662, 667).

Defendants made several efforts to get the case dismissed before trial, filing a demurrer and two motions for summary judgment (AA. 32-36, 40-44, 48-49; R. 649). These efforts were decisively rejected by three different judges (id.). The two judges who denied the summary judgment motions, expressly determined, after reviewing deposition testimony and other evidence, that the lawsuit presented triable issues of fact (id.).[3]

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[3]The petitioner made good faith efforts to settle the case before trial, including a formal offer to settle for $5,867.40, a small fraction of the costs incurred by him as a result of the defendants' actions (AA. 45-47). That offer was summarily rejected by the defendants.

The petitioner also sought redress short of trial with the State Bar of California but was told that his only option was to pursue the matter in a court of law (A.42).

A jury trial was held at which the plaintiff, who represented himself and his law offices, presented eight days of testimony. At the close of plaintiff's case, upon defendants' motion for nonsuit, the trial judge, without any explanation whatsoever, granted the nonsuit motion and, sua sponte, ordered that a hearing be held under Cal. Code Civ. Proc. § 128.5 to determine whether to impose sanctions (R. 935; AA. 171). The judge offered no explanation as to how the trial evidence varied from the pleadings and documentary evidence which had withstood the scrutiny of the motions judges (see R. 936).[4] In

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[4]The written judgment stated only that "[t]he motion for non-suit was granted on January 14, 1992, upon proof made to the satisfaction of the court that the motion should be granted" (AA. 171).

fact, the trial evidence substantially conformed to the allegations in plaintiff's pretrial pleadings and to the portions of the deposition testimony annexed to his oppositions to the summary judgment motions (R. vols. I-VI; see R. 935; AA. 171). The judge ordered plaintiff to file papers relating to the sanctions issue on the same date as defendants, without affording plaintiff notice of his reasons for conducting the sanctions hearing, and effectively denying plaintiff an opportunity to respond to defendants' filings (R. 936).

At the sanctions hearing, the judge, before any presentations had been made, stated that he was "ready to rule" (R.

941). When plaintiff sought to present witnesses on his own behalf and to examine the sources of the documentary and other hearsay evidence offered by defendants about the fees and costs they had purportedly incurred as a result of the lawsuit, the judge refused (R. 961-962). Over plaintiff's carefully articulated objections based on his constitutional rights to due process and to a jury trial, the judge assessed plaintiff costs in the amount of $218,299.10 (R. 943-953, 956, 961-963; see AA. 168-169, 296-298).[5]

Plaintiff timely filed a notice of

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[5]Before the sanctions order was signed, plaintiff filed and sought to serve on the judge a statement of disqualification based upon newly discovered evidence of the judge's admitted longstanding friendship and professional relationship with members of defendants' firm and upon the judge's hostile conduct throughout the trial (AA. 100-118).

appeal (AA. 275). The judgment of the trial court was affirmed by a panel of the Court of Appeal on December 28, 1993 (A.2), and plaintiff's petition for rehearing was denied on January 27, 1994 (A.40). The California Supreme Court denied plaintiff's petition for review on April 20, 1994 (A.41).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW, IN CONSTRUING CALIFORNIA LAWS AND PROCEDURES TO AUTHORIZE A TRIAL JUDGE TO IMPOSE SUBSTANTIAL PUNITIVE SANCTIONS ON AN ATTORNEY FOR PROCEEDING TO TRIAL ON A LAWSUIT, EVEN THOUGH THE LAWSUIT HAD PREVIOUSLY SURVIVED MOTIONS FOR SUMMARY JUDGMENT, VIOLATES FUNDAMENTAL PRINCIPLES OF DUE PROCESS, HIGHLIGHTS A CONFLICT BETWEEN FEDERAL CIRCUIT COURTS, AND HAS PROFOUNDLY DISTURBING IMPLICATIONS FOR PLAINTIFFS' ATTORNEYS THROUGHOUT THE COUNTRY.

This case raises a serious

constitutional issue of first impression which has profoundly disturbing implications for plaintiffs' attorneys throughout the country, for their clients, and, indeed, for the very meaning of advocacy in an adversarial system: may state laws and procedures constitutionally authorize a trial judge to impose substantial punitive sanctions on an attorney for proceeding to trial on a lawsuit, even though that lawsuit, on substantially the same evidence, had survived a prior demurrer and one or more motions for summary judgment before different judges?[6] The court below, by

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[6]Although Attorney Scott represented himself and his professional corporation pro se, the courts below properly refrained from premising their rulings on the distinction between the pro se litigant and the

answering this question in the affirmative, effectively imposes new ethical and legal obligations on lawyers which are alien to our adversarial system and which will radically alter the ground rules by which lawsuits are to be conducted.

It is beyond cavil that certain "basic procedural protections" are so rooted in the common law as to constitute essential requirements of constitutional due process. Honda Motor Co., Ltd. v. Oberg, 62 U.S.L.W. 4627, 4631 (U.S. Jun. 24, 1994) (No. 93-644). Amongst these "basic" protections

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attorney representing a client. If anything, the legal and ethical dilemmas facing an attorney representing a client are particularly acute, in that attorneys who, out of fear of punitive sanctions, move to voluntarily dismiss their client's lawsuit over their client's wishes, may, in doing so, be subjecting themselves to future malpractice claims.

are the standards and quanta of proof by which the substantive rights of litigants are determined. See In re Winship, 397 U.S. 358 (1970). Where particular standards and quanta of proof have been found to place undue "risks of error" on a litigant or to be otherwise inconsistent with the purposes they were designed to serve, this Court has not hesitated to hold such standards and quanta to be violative of the Due Process Clauses of the Fifth and Fourteenth Amendments. See, e.g., Addington v. Texas, 441 U.S. 418, 427 (1979); Santosky v. Kramer, 455 U.S. 745, 754, 764 (1982); In re Winship, supra, 397

U.S. 358.[7]

'Although the inconsistent application of standards and quanta of proof required for summary judgment on the one hand, and the imposition of sanctions on the other, has not been squarely subjected by this Court to constitutional due process scrutiny, two circuit courts of appeals,

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'In Addington v. Texas, supra, 441 U.S. at 427, a preponderance of the evidence standard for civil commitment cases was rejected on the ground that it improperly compelled the individual "to share equally with society the risk of error when the possible injury to the individual is significantly greater than the harm to the state." In Santosky v. Kramer, supra, 455 U.S. at 754, 764, a preponderance standard for parental termination cases was rejected on the ground that "the state's ability to assemble its case almost inevitably dwarfs the parent's ability to mount a defense and that this tended to create a "significant risk of error," given the "commanding" interests of parents in retaining custody. And in In re Winship, supra, 397 U.S. 358, the Court rejected any standard of proof requiring less than proof beyond a reasonable doubt in juvenile proceedings on the ground that juveniles wrongly convicted would suffer complete deprivation of liberty.

which have been confronted by similar claims, have handed down decisions under federal rules of procedure which run in starkly different directions. On the one hand, the Third Circuit in Gillette Foods Inc. v. Bayernwald-Fruchtverwertung, 977 F.2d 809, 814 (3d Cir. 1992), in reversing a federal district court's exercise of its "inherent power" to impose $25,000 sanctions on plaintiff's counsel, held that the imposition of such sanctions was "inconsistent" with the fact that plaintiff's pleadings had survived three summary judgment motions, a motion for involuntary dismissal made at trial, as well as a motion for sanctions under Fed.

R. Civ. P. 11 and had to be overturned.[8] The lower court's imposition of sanctions was vacated even though the trial judge had found that the evidence at trial demonstrated that plaintiff's claim against one of the defendants was "utterly without merit both factually and legally" and even though the inclusion of that defendant was deemed to have been "an egregious litigation tactic" employed in "bad faith." It was the Third Circuit's view that the judicial go-ahead constituted, amongst

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[8]The Gillette ruling was premised, in part, on the fact that unlike the "inherent power" of federal courts to impose sanctions, which requires a showing of "bad faith," Rule 11 requires only a showing of "reasonable inquiry" -- and not "bad faith" -- before sanctions can be imposed. See Chambers v. Nasco, 501 U.S. 32 (1991). Like the "inherent power" of federal courts to impose sanctions, § 128.5 expressly requires a showing of "bad faith" by the sanctioned litigant.

other things, by a denial of summary judgment should ordinarily be sufficient to preclude a finding of "bad faith" necessary to the imposition of attorney sanctions under the court's common law powers.

On the other hand, a dramatically different result was reached by the First Circuit in Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600 (1st Cir. 1988), which held that the fact that a plaintiff's pleadings survived a summary judgment motion did not automatically preclude the issuance of Rule 11 attorney sanctions, at least where subsequent depositions revealed the prior existence of a factual dispute to have been "illusory." In so ruling, that Court, per Breyer, C.J., remarked in broad

dicta that the federal "summary judgment standard (based on filed documents) and Rule 11's standard (based on what reasonable inquiry should have revealed, perhaps about other information)" were not "necessarily or inevitably congruent," and thus, impliedly, did not require congruent treatment.

Where, as here, a lawsuit has survived one or more demurrers and summary judgment motions -- and has thus been judicially determined to raise viable claims of law and triable issues of material fact -- such a lawsuit can never be deemed "frivolous" or in "bad faith," absent an explicit determination that the evidence presented at trial substantially conflicted

with the pleadings and documentary evidence attached thereto. The California scheme as construed by the state courts below, however, runs directly contrary to law, logic and common sense.

Under California law, a defendant is permitted to move for summary judgment as to any cause of action which the defendant contends has "no merit." Cal. Code. Civ. Proc. § 437c(a). Motions for summary judgment are to be granted only if it is determined that there "no triable issue[s] as to any material fact and that the moving party is entitled to a judgment as a matter of law." § 437c(c). Motions for summary judgment as well as oppositions thereto, are to be "supported by affidavits,

declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." § 437c(b). Consequently, a cause of action which has survived summary judgment based upon the appropriate evidentiary attachments has been judicially determined to be sound "as a matter of law," to present "triable issues of fact," and thus, to be non-frivolous.

While a trial judge may grant a motion for nonsuit at the close of plaintiff's case where, under the evidence presented, "no possibility exists that a cause of action can be proved," Weyburn v. California Kamloops, Inc., 19 Cal.Rptr. 357, 360 (Cal.App.Ct. 1962); Cal. Code Civ.

Proc. § 581c(a),[9] attorneys may be sanctioned for improperly litigating a nonsuited case under Cal. Code Civ. Proc. § 128.5 only if the attorney has engaged in "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay."[10]

In the instant case, two different motions judges expressly determined that the lawsuit presented "triable issues of fact," and effectively ruled that the

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[9]In ruling on a motion for nonsuit, "[a]n appellate court must resolve every conflict in the evidence in favor of the plaintiff, consider every reasonable inference and every presumption which supports the plaintiff, and accept as true all direct or indirect evidence which tends to sustain the plaintiff's case." Ayer v. Boyle, 112 Cal.Rptr. 636, 639-640 (Cal.Ct.App. 1974); see Carson v. Facilities Development Co., 686 P.2d 656, 660 (Cal. 1984).

[10]The term "frivolous" is defined in § 128.5 as meaning "(A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party."

defendant was not "entitled to judgment as a matter of law" (AA. 40-44, 48-49; R. 649). At no time did the trial court make any judicial determination that the plaintiff's evidence at trial failed to conform to his pretrial pleadings or that the trial testimony materially differed from the deposition testimony. To the extent that the trial court and the Court of Appeal adopted a view of the legal elements of plaintiff's claims which substantially differed from the views of the motions judges who denied the summary judgment motions, this only highlighted the unfair, illogical and, at bottom, unconstitutional risks that plaintiff was

made to run.[11] Attorneys must surely be

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[11]The findings of the trial judge and the Court of Appeal, on the one hand, and of the two motions judges, on the other, were legally and factually inconsistent in a number of ways, including the following. First, the trial judge found that plaintiff had been fully "aware" that "the reason Mr. Krissman had called Mr. Cook [sic--Cooke] was because he had been requested to and was told Mr. Cook wanted a second opinion (A.71). In connection with this, the Court of Appeal ruled that there was "no evidence of unjustifiable acts by Krissman intended to disrupt a contractual relationship" because California's Rules of Professional Conduct 2-100(C)(2) allows parties to initiate a conversation with an attorney in order to "hire new counsel or to obtain a second opinion"(A.15). The first motion judge, however, had expressly ruled that "whether the remarks attributed to Mr. Krissman, if made, were within the scope of what was asked for, namely a 'second opinion'" was a "triable issue of fact"(A.47). The motion judge thus effectively recognized that if Krissman's statements went beyond a "second opinion," these statements would not have been privileged, and would thus have been actionable. Indeed, Krissman's false and derogatory assertions about plaintiff's experience and ability would have been actionable even if Krissman's original intention was simply to offer a second opinion.

Second, the trial judge, having found that plaintiff was "at all times during the pendency of the within litigation, aware that his client James Cook had complete confidence and trust in him and in fact ... kept [plaintiff] as his attorney throughout the pendency of Mr. Cook's underlying litigation" (A.71), the Court of Appeal concluded that there were no actual damages suffered by plaintiff as there was no actual disruption of plaintiff's contractual relationship with his clients, even though plaintiff

able to place some reliance on rulings by motion judges that their pleadings, as supported by evidentiary attachments, were

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estimated that he was required to spend over $80,000 to preserve his contractual relationship (A.16; R. 669-670). Given that these facts had been fully set forth before the motions judges, it is apparent that they must have entertained a contrary view of the legal elements necessary to make out a tortious interference with contract. In any event, it is far from clear that the Court of Appeal was correct in its understanding of prior California precedent. See Shamblin v. Berge, 212 Cal.Rptr. 313, 315-316 (Cal.App.Ct. 1985).

Third, as to plaintiff's action in defamation, the Court of Appeal ruled that Krissman's statements to plaintiff's clients, falsely denigrating plaintiff's legal experience, if defamatory, were subject to a "qualified privilege" for statements made "without malice" and that plaintiff failed to establish that the statements were "motivated by hatred or ill will" (A.19-20). Both of the motions judges, however, had expressly denied defendants' summary judgment motions on the ground that Krissman's "state of mind" was a triable issue of fact (A.49, 55). To the extent that the Court of Appeal ruling was premised on its legal opinion that evidence that an attorney sought to entice a client from another attorney is insufficient as a matter of law to establish "malice," the Court has once again made a legal judgment different from that of the motions judges. It is fundamentally unfair to make plaintiff shoulder the risks of error where the error, if any -- and plaintiff steadfastly denies that his legal theories were erroneous -- had eluded detection by two other judges.

sufficiently sound not only to survive a summary judgment motion, but to avoid being labelled "frivolous" or "bad-faith actions," warranting the imposition of such draconian sanctions. The "risks of error" imposed on plaintiff as a result of the glaringly inconsistent and irrational application of California's standards and quanta of proof constituted a flagrant violation of the Due Process Clause.

The California scheme has disturbingly broad implications for an adversarial system such as ours in which "lawyers [must] be able to make honest, good-faith efforts to present their client's cases." In re McConnell, 370 U.S. 230, 236 (1962). "[A]n attorney is not an insurer ... that

his client will win litigation[;] [r]ather, he has a duty to represent his client zealously ... [by seeking] any lawful objective through legally permissible means ... [and by presenting] for adjudication any lawful claim, issue, or defense." A.B.A. Code of Professional Responsibility, EC 7-1, DR 7-101(A)(1). "If the issue which the attorney is called upon to decide is fairly debatable, then under his oath of office, he is not only authorized but obligated to present and urge his client's claim upon the court." Kassan v. Bledsoe, 60 Cal.Rptr. 799, 803 (Cal.App.Ct. 1967) (citation omitted).

As a consequence of the decision below, attorneys in California will be

compelled to second-guess judges and to voluntarily seek dismissal of their own clients' cases, an outcome which strikes at the very heart of the adversarial system by converting attorneys into judges of their own clients' cases.[12]

Because California's scheme, as construed by its courts, unfairly and

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[12]As the California Supreme Court stated on another occasion:

> Counsel face the danger of being trapped between their obligation to their clients to diligently pursue any possibly meritorious claim, and their obligation to the judicial system to refrain from prosecuting frivolous claims .... The strong public policy in favor of the peaceful resolution of disputes in the courts requires that attorneys not be deterred from pursuing legal remedies because of a fear of personal liability .... If the issue which the attorney is called upon to decide is fairly debatable, then under his oath of office, he is not only authorized but obligated to present and urge his client's claim upon the court.

In re Marriage of Flaherty, 646 P.2d 179, 185-186 (Cal. 1982).

irrationally places the risks and consequences of error on plaintiffs' attorneys by allowing for the imposition of highly punitive sanctions upon them even where they have been given a green light by one or more motions judges, because the lower courts addressing this question have reached different conclusions, and because this case raises a recurring question of great importance to plaintiffs' attorneys throughout the country, certiorari should be granted.

II.

THE DECISION BELOW, BY UPHOLDING THE IMPOSITION OF SUBSTANTIAL PUNITIVE ATTORNEY SANCTIONS WITHOUT AN EVIDENTIARY HEARING OR A JURY TRIAL, VIOLATED PETITIONER'S FUNDAMENTAL RIGHTS TO DUE PROCESS AND TO A JURY TRIAL, AND RAISES SIGNIFICANT AND UNRESOLVED QUESTIONS IN THE CRITICALLY IMPORTANT AND RAPIDLY DEVELOPING AREA OF ATTORNEY SANCTIONS WHICH REQUIRE THIS COURT'S GUIDANCE.

While courts possess inherent power to assess counsel fees and levy sanctions in response to genuinely abusive litigation practices, see Link v. Wabash R. Co., 370 U.S. 626, 630-633 (1962), there are minimal procedural due process requirements which must be met before such fees may be assessed or such sanctions imposed. Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-767 & n. 14 (1980). In determining which procedural protections are constitutionally

required in any given forum or proceeding, this Court has consistently found that "some kind of hearing" along with certain meaningful procedural protections must be provided before a person may be finally deprived of his property interests. See Wolff v. McDonnell, 418 U.S. 539, 557 (1974). Adequate notice and an opportunity to respond to adverse evidence have uniformly been deemed essential. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

While this Court has made clear that "attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record," Roadway Express v. Piper, supra,

447 U.S. at 767,[13] the Court has never before definitively enumerated exactly which basic procedural protections are necessary before substantial punitive attorney sanctions may be imposed. The federal circuit courts of appeals, in addressing the constitutional requirements for the imposition of attorney sanctions by federal district courts, have differed as to the level of protection necessary. While many circuits have afforded district court judges wide latitude in determining the circumstances under which the various features of an adversarial hearing may be

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[13]Recent revisions in Fed. R. Civ. P. 11, by creating a safe harbor provision and by eliminating the mandatory nature of sanctions, evidence a trend toward providing broader federal procedural protections when imposing attorney sanctions. 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1337 (2d ed. Supp. 1994).

necessary, see International Shipping Co. v. Hydra Offshore, Inc., 875 F.2d 388, 392 (2d Cir.), *cert. denied*, 493 U.S. 1003 (1989); Alizadeh v. Safeway Stores, Inc., 910 F.2d 234, 236-237 (5th Cir. 1990); Kapco Mfg. Co., Inc. v. C & O Enterprises, Inc., 886 F.2d 1485, 1494-1495 (7th Cir. 1989); Dodd Ins. Services, Inc. v. Royal Ins. Co. of America, 935 F.2d 1152, 1160 (10th Cir. 1991), other circuit courts have mandated comparatively extensive procedural protections, especially where the sanctions imposed are punitive, see Media Duplication Services, Ltd. v. HDG Software, Inc., 928 F.2d 1228, 1238 (1st Cir. 1991); Spiller v. Ella Smithers Geriatic Center, 919 F.2d 339, 347 (5th Cir. 1990). See also

Donaldson v. Clark, 819 F.2d 1551, 1559-1561 (11th Cir. 1987).

While few of the ingredients of a full-blown evidentiary hearing are necessary in cases where the amount of the sanctions under consideration is small and merely compensatory, where the sanctions are substantial, or indeed, punitive, there are, as the Ninth Circuit observed, particularly "compelling reasons" for the provision of more stringent procedural requirements:

> [T]he attorneys will have an opportunity to prepare a defense and to explain their questionable conduct at a hearing; the judge will have time to consider the severity and propriety of the proposed sanction in light of the attorneys' explanation for their conduct; and the facts supporting the sanction will appear in the record, facilitating appellate

review.

Miranda v. Southern Pacific Transp. Co., 710 F.2d 516, 522-523 (9th Cir. 1983). See also Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (constitutional due process imposes substantive limits on the size of punitive damage awards); Honda Motor Co., Ltd. v. Oberg, supra, 62 U.S.L.W. at 4631; International Union, United Mine Workers of America v. Bagwell, 62 U.S.L.W. 4705, 4708 (U.S. Jun 30, 1994) (No. 92-1625). This is because the imposition of severe or punitive sanctions tends to pose a "danger of chilling the diligent pursuit of lawsuits by an attorney for his or her client." Monex International, Ltd. v. Peinado, 274

Cal.Rptr. 667, 670 (Cal.App.Ct. 1990).

California's statutory regime, while expressly requiring that attorneys subject to sanctions be given "notice and opportunity to be heard," has been construed by the state courts in such a way as to give the lower courts unbridled discretion in deciding exactly which procedural protections are constitutionally necessary in a given case. Although the California Supreme Court in Lavine v. Hospital of the Good Samaritan, 215 Cal.Rptr. 708, 714 (Cal.App.Ct. 1985), upheld the constitutionality of § 128.5 on the ground that the statute does not preclude a party facing sanctions from subpoenaing witnesses and producing

evidence, the statute has been construed in other cases so as not to require that courts afford parties these basic procedural protections. See, e.g., Endler v. Schutzbank, 436 P.2d 297, 303 (Cal. 1968); Lesser v. Huntington Harbor Corp., 219 Cal.Rptr. 562, 567 (Cal.App.Ct. 1985). Whereas some California courts have been comparatively demanding of judges considering the imposition of sanctions, others have been far less exacting. Compare In re Marriage of Flaherty, supra, 646 P.2d at 190; Lesser v. Huntington Harbor Corp., supra, 219 Cal.Rptr. at 568; with In re Marriage of Quinlan, 257 Cal.Rptr. 850, 853 (Cal.App.Ct. 1989). Attorneys in California have thus been left

with little basis for predicting what process will be afforded them before a court decides whether to impose sanctions upon them.

In the instant case, the trial judge, at the close of plaintiff's case, granted defendants' motion for nonsuit and, sua sponte, ordered that a sanctions hearing be held pursuant to Cal. Code Civ. Proc. § 128.5. At the hearing, while the judge ultimately allowed plaintiff to present legal argument, the judge expressly refused to allow plaintiff to call witnesses or to examine the source of hearsay declarations presented to the court by defendants, stating, "No. That's denied. You are supposed to do it by declarations, counsel.

I'm not going to violate every rule of court for you" (R. 961-962). Plaintiff meticulously objected to the judge's procedures, asserting his constitutional rights to due process and to a jury trial (R. 943-944). The judge nonetheless imposed $218,299.10 in sanctions. The judge's conduct of the hearing thus violated plaintiff's due process right to an evidentiary hearing. Given the exorbitant and highly punitive nature of the sanctions imposed, the defendant's right to a jury trial, under the terms of the Seventh and Fourteenth Amendments, was also violated. See International Union, United Mine Workers of America v. Bagwell,

supra, 62 U.S.L.W. at 4708.[14]

Given the increasing frequency with which sanctions are imposed, given the disparate constitutional treatment among the courts, and given the potential chill on zealous advocacy cast by the imposition of exorbitant, if not punitive, attorney sanctions, this Court's guidance is needed to contain the unconstitutionally broad discretion permitted judges under schemes such as California's. This Court should thus grant certiorari in order to resolve

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[14]Cal. Code Civ. Proc. § 128.5, in general allows only for the imposition of "reasonable expenses, including attorney's fees," and, except in circumstances not applicable here, does not permit the imposition of "punitive" sanctions. Because plaintiff was barred by the judge from examining members of defendants' law firm in order to determine how their fees and expenses were arrived at, he was effectively precluded from establishing that the sanctions amount was not merely compensatory, as § 128.5 provided for, but was effectively punitive.

the growing split amongst the circuit courts and to provide much needed uniformity in this most critical area of the law.

CONCLUSION

Attorney C. Brent Scott stands accused of having somehow pursued his lawsuit in "bad faith." For that, he has been sanctioned in an amount reaching almost a quarter of a million dollars. Yet he still has never been properly notified of what his bad-faith actions consisted, nor has he ever been given a proper forum with proper procedures in which to refute these accusations. Nor have attorneys in California, or elsewhere, properly been advised of the circumstances under which

their ethical obligations to zealously advocate on their clients' behalf must yield to other considerations. This case thus presents the Kafkaesque spectacle of punishment without a lesson, justice without fairness.

In the absence of a clear and definitive ruling by this, our nation's highest Court, attorneys will continue to face troubling uncertainties in fulfilling their roles as zealous advocates. Because California's statutory scheme, as construed by its courts, unfairly and irrationally places the risks and consequences of error on plaintiffs' attorneys, because the California scheme fails to provide constitutionally adequate procedural due

process protections before extremely punitive attorney sanctions may be imposed, because the federal courts which have addressed these questions have reached contrary conclusions, and because this case raises recurring questions of great importance to plaintiffs' attorneys throughout this country, certiorari should be granted.

Respectfully submitted,

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Dated: July 18, 1994

APPENDIX

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

C. BRENT SCOTT et al.,	)	G012464
	)	
Plaintiffs and Appellants,	)	(Super. Ct.No. 583115)
	)	
v.	)	OPINION
	)	
JOEL KRISSMAN et al.,	)	
	)	
Defendants and Respondents.	)	
	)	

APPEAL from a judgment of the Superior Court of Orange County, James R. Ross, Judge. Affirmed.

Paoli & Paoli and Sylvia L. Paoli for Plaintiffs and Appellants.

Silver, McWilliams, Stolpman, Mandel, Katzman, Krissman & Elber and Donna Silver for Defendants and Respondents.

C. Brent Scott, an attorney, sued attorney Joel Krissman and the law firm in which he is a partner, Silver, McWilliams, Stolpman, Mandel, Katzman & Krissman for intentional interference with contract and defamation. Krissman had telephoned a client of Scott's, at the client's request, to render a "second opinion" on the client's lawsuit. The client remained with Scott and Scott ultimately settled the client's suit for $5.2 million. Scott sued Krissman claiming the 15 minute conversation caused him damage in the form of time and money he and his wife spent to

assuage the client and restore the client's confidence in Scott. Following the close of Scott's case, the trial court granted a nonsuit in favor of Krissman and his law firm. Subsequently the court sanctioned Scott for having filed and pursued a frivolous lawsuit, ordering him to pay Krissman's legal fees and costs of $218,299.10. Scott's subsequent motion to disqualify the trial judge was denied.

Scott appeals, raising several contentions: (1) the trial court erred in granting the motion for nonsuit because there was sufficient evidence to submit both causes of action to the jury; (2) the trial court erred in denying his motion to amend the complaint to state a cause of

action for violation of professional rules; (3) the trial court erred in admitting evidence of other similar lawsuits which Scott had filed against other clients; (4) the trial court erred in denying his motion to disqualify the trial judge; and (5) the sanction award was an abuse of discretion because he was denied a fair hearing and insufficient evidence supported the amount awarded. We affirm.

* * *

In October 1988 James Cooke, a pipe fitter, was seriously injured in an explosion at his work place. Cooke's wife, Ann, spoke with Allen Jones, the business manager of Cooke's union, and asked for the names of attorneys to represent Cooke.

Jones gave her the names of several attorneys but she did not contact any of them. Instead, a friend gave her Scott's name and she contacted him.

After speaking to Scott at the hospital, Ann signed a retainer agreement. The agreement was never signed by Cooke, nor did Ann ever have a power of attorney to sign contracts on her husband's behalf. Cooke later orally approved of Scott's representing him. The agreement provided for a contingency fee for the personal injury lawsuit. It also provided Scott would have a lien for 12 percent of any worker's compensation award. Scott did not explain to Ann that he was required by law to accept the fees set by the worker's

compensation court and he could not legally lien the award. Nor did he advise Ann that the contingency agreement she had signed was in violation of Business and Professions Code section 6147 and was voidable at the client's option.

In early 1989 Jones became concerned about Scott's handling of Cooke's case. At a dinner in February 1989, Jones met Attorney Krissman. Krissman was a partner in a law firm that specialized in industrial accidents and had represented other members of the union. Jones told Krissman he was concerned about Scott's handling of Cooke's case and asked him to find out what he could about Scott's credentials.

Krissman investigated and told Jones he could not find Scott listed in the last seven to eight years of O'Brien's Evaluator which tracks civil trials and that none of Krissman's law partners had ever heard of Scott. Jones asked Krissman to contact Cooke and give him a "second opinion" about the case. Jones made a note to himself about the matter stating Scott "hasn't tried civil lawsuit" which was Jones' interpretation of what Krissman had told him.

Jones called Cooke on February 21. He told Cooke that he had concerns about Scott's ability to handle Cooke's case. Jones urged Cooke to get a second opinion and mentioned that he had already spoken

with Krissman. Cooke told Jones he was happy with Scott's handling of the case, but to have Krissman call him anyway. Jones then called Krissman and told him Cooke wanted to speak to him.

Krissman called Cooke on February 22 and spoke with him for about 15 minutes. He told Cooke about the experience his own firm had in handling industrial accident litigation. He also told Cooke that Scott had never handled a case as big as Cooke's before. Cooke said he was happy with Scott but agreed to meet with Krissman. He later explained he agreed to a meeting to end the conversation, but never intended to meet with Krissman.

After the Krissman telephone call the

Cookes were briefly concerned about whether they had chosen a qualified attorney in Scott. Cooke called Scott the next day, February 23, and informed him of the conversations with Jones and Krissman. After talking to Scott, Cooke decided he was perfectly happy with Scott's representation, and told Scott he had full confidence in him and had no intention of changing lawyers. The next day Scott filed this lawsuit against Krissman and his law firm. He arranged to have the complaint served on Krissman at the scheduled meeting with Cooke.

Concerned that his client might leave him, Scott and his wife began socializing with the Cookes. They also took the Cookes

to Hawaii and camping. Scott also began to encourage Cooke to attend trials with him and to participate in each step of his own case to maintain Cooke's confidence. Eventually Scott settled Cook's civil case for $5.2 million, and also settled the worker's compensation matter.

I

Scott contends the court erred in granting Krissman's motion for nonsuit because there was sufficient evidence to go to the jury on his intentional interference with contractual relationship and defamation causes of action. We disagree and affirm the nonsuit.

Code of Civil Procedure section 581c, subdivision (a) provides that in a jury

trial after the plaintiff has finished his or her opening statement or has completed the presentation of evidence, the defendant may move for nonsuit. "A trial court must not grant a motion for nonsuit if the evidence presented by the plaintiff would support a jury verdict in the plaintiff's favor. [Citation.] [¶] In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give to the plaintiff['s] evidence all the value to which it is legally entitled, ... indulging every

legitimate inference which may be drawn from the evidence in plaintiff['s] favor ...." (Carson v. Facilities Development Co. (1984) 36 Cal.3d 830, 838-839, internal quotation marks omitted.) On appeal we must evaluate the evidence in the light most favorable to the plaintiff and reverse the judgment of nonsuit if there is evidence which would have supported a plaintiff's verdict. (Id. at p. 839.)

A. INTENTIONAL INTERFERENCE WITH CONTRACT

The tort of interference with a contractual relationship protects a plaintiff against intentional acts which do not necessarily result in a breach of contract. To prevail a plaintiff must prove: (1) a valid existing contract with

a third party; (2) the defendant's knowledge of the contract; (3) intentional and unjustified acts by the defendant designed to disrupt the contract; (4) actual disruption of the relationship; and (5) resulting damage. (Shamblin v. Berge (1985) 166 Cal.App.3d 118, 122-123.)

Scott's claim against Krissman fails for several reasons. There is no evidence of intentional and unjustified acts by Krissman intended to disrupt a contractual relationship. Scott contends the communication was necessarily unjustified because rule 2-100 of the Rules of Professional Conduct specifically prohibits one lawyer from communicating with a person known to be represented. He misunderstands

the rule. Rule 2-100 (C)(2) specifically allows "[c]ommunications initiated by a party seeking advice or representation from an independent lawyer of the party's choice." The rule is "intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion." (23 West's Cal. Codes Ann. Rules, pt. 2 (1981 ed., 1993 cum. supp.) Discussion, p. 619.) Krissman was approached by Cooke's union representative, Jones, with concerns about Cooke's case. Jones contacted Cooke and suggested he speak with Krissman. Cooke agreed and told Jones to have Krissman call him.

There was absolutely no disruption of Cooke's and Scott's relationship or damage

to Scott. Cooke testified that all along he was completely pleased with Scott and told Scott as much. At most for one day Cooke and his wife had some doubts about Scott's abilities. Cooke never again spoke with Krissman or any other attorney about the case and there is absolutely no evidence that Cooke ever had any intention of finding another lawyer. Furthermore, Scott was not damaged. Spending money and time to cement his relationship with Cooke simply cannot be considered legal damage. There was no evidence to support Scott's interference with contractual relationship cause of action and granting nonsuit was proper.

B. DEFAMATION AND DISPARAGEMENT

Scott also attempted to prove defamation and disparagement,[1] contending that Krissman's comment that no one had ever heard of Scott and he had never handled a case the magnitude of Cooke's was defamatory. Slander is a "false and unprivileged publication, orally uttered ... which: ... [¶] 3. Tends directly to injure [a person] in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other

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[1] Disparagement is a distinct tort from slander or defamation. Scott raises no arguments as to why the court's granting nonsuit on the disparagement cause of action was incorrect. He has waived the issue and we do not address it.

occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits." (Civ. Code, § 46.)

Preliminarily, it is apparent the statement was never understood by Cooke to be defamatory of Scott. Cooke testified that but for a few moments of doubt, he always was completely happy with Scott, believed him to be a great attorney, and had no inclination to change lawyers. Scott insists the statements could easily have tremendously damaged his reputation as a lawyer and in the community because they tended to suggest he was incompetent. However, Krissman's statements were not

made to anybody other than Jones and Cooke. The uncontroverted evidence was that Scott enjoyed great success as a lawyer and had a good reputation.

Furthermore, Krissman's communication with Cooke was subject to a qualified privilege. A qualified privilege exists when a statement is made "without malice, to a person interested therein, (1) by one who is also interested, ... or (3) who is requested by the person interested to give the information." (Civ. Code, § 47, subd. (c).) Krissman was approached by Jones and asked by him to render a second opinion on Cooke's case. Jones then spoke with Cooke who told Jones to have Krissman call him. Since Krissman was asked to give the

information by interested parties, a prima facie case for the qualified privilege was made. The burden was on Scott to prove malice existed at the time of the communication. (Katz v. Rosen (1975) 48 Cal.App.3d 1032, 1037.) "The degree of malice required to vitiate a claim of qualified privilege is 'a feeling of hatred or ill will going beyond that which the occasion for the communication apparently justified ....'" (Ibid.) There is no evidence Krissman's statements were motivated by hatred or ill will.

III

Scott next contends the trial court erred in denying his motion to amend his complaint to add a cause of action for

violation of the Rules of Professional Conduct. He contends that Krissman's communication with Cooke violated professional rules regarding solicitation of clients and prohibiting communications with a party known to be represented by counsel. (Rules Prof. Conduct, rules 1-400 & 2-100.) Scott had filed a complaint with the State Bar which apparently refused to take action because the allegations were already part of his civil action.

The trial court did not err in denying the amendment. While violation of a disciplinary rule may be used to demonstrate that an attorney has breached some duty, there is no independent cause of action for breach of a disciplinary rule.

(Mirabito v. Liccardo (1992) 4 Cal.App.4th 41, 46; Wilhelm v. Pray, Price, Williams & Russell (1986) 186 Cal.App.3d 1324, 1333, fn. 5; Noble v. Sears, Roebuck & Co. (1973) 33 Cal.App.3d 654, 658-659.)

IV

Scott next contends the trial court should have excluded evidence regarding a similar case Scott had pending against former clients. Scott had been representing an attorney and his wife in a medical malpractice case involving the couple's child. When the clients changed attorneys, Scott sued the husband seeking punitive damages for intentional interference with contract, contending the husband had promised not to interfere with the case.

Scott contends the evidence should have been excluded because its prejudicial effect on the jury was outweighed by its probative value. (Evid. Code, § 352.) Because the case never went to the jury, the point is moot. There can be no possible harm from the evidence and we need not address the matter further.

V

Scott next contends his motion for disqualification of the trial judge was wrongly denied. We note the motion was not filed until after a judgment unfavorable to Scott was rendered. The motion was denied, Scott's petition for a writ of mandate was denied by this court and review was denied by the Supreme Court.

Scott's contention is not reviewable on appeal. The exclusive method for reviewing the denial of a motion to disqualify a judge is a petition for mandamus. (Code Civ. Proc., § 170.3, subd. (d).) The matter cannot be raised a second time on appeal from an unfavorable judgment. (People v. Hull (1991) 1 Cal.4th 266, 276.)

VI

Finally, Scott contends the award of $218,299.10 in sanctions was an abuse of discretion because maintenance of the action was not in bad faith, the trial judge had prejudged the issue of sanctions and the evidence does not support the amount awarded.

Code of Civil Procedure section 128.5 authorizes the imposition of sanctions for "bad-faith actions or tactics" which are frivolous or intended solely to cause unnecessary delay. A frivolous action is one either "totally and completely without merit" or "for the sole purpose of harassing an opposing party." Numerous appellate decisions have concluded section 128.5 authorizes the imposition of sanctions for the frivolous and bad faith maintenance of an entire action, not simply for attorney or party misconduct during the litigation. (Southern Christian Leadership Conference v. Al Malaikah Auditorium Co. (1991) 230 Cal.App.3d 207, 225-226; Finnie v. Town of Tiburon (1988) 199 Cal.App.3d 1,

9-10; Lesser v. Huntington Harbor Corp. (1985) 199 Cal.App.3d 922, 930. See also Llamas v. Diaz (1990) 218 Cal.App.3d 1043, 1046.) "Nothing in section 128.5's language limits the section's application only to tactics or motions. In fact, the section specifically states frivolous actions are not limited to making or opposing motions without good faith. A reasonable interpretation is that the section also applies to entire actions not based on good faith which are frivolous or cause unnecessary delay in the resolution of a dispute." (Lesser v. Huntington Harbor Corp., supra, 173 Cal.App.3d at p.

930, fn. omitted.)[2]

To impose sanctions there must be a showing the action was frivolous or without merit and that it was pursued in bad faith.

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[2] Although the Supreme Court has not expressly agreed, recent opinions emphasize the strong judicial and legislative preference for avoiding a second round of litigation in the form of a malicious prosecution suit. In Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal.3d 863, the Supreme Court refused to relax the strict limitations on malicious prosecution suits, noting, "While the filing of frivolous lawsuits is certainly improper and cannot in any way be condoned, in our view the better means of addressing the problem of unjustified litigation is through the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct within that first action itself, rather than through an expansion of the opportunities for initiating one or more additional rounds of malicious prosecution litigation after the first action has been concluded. In recent years, the Legislature has taken several steps in this direction, enacting legislation to facilitate the early weeding out of patently meritless claims and to permit the imposition of sanctions in the initial lawsuit--against both litigants and attorneys--for frivolous or delaying conduct. (See, e.g., Code Civ. Proc., § § 437c, 1038, 128.5, 409.3.) Because these avenues appear to provide the most promising remedies for the general problem of frivolous litigation, we do not believe it advisable to abandon or relax the traditional limitations on malicious prosecution recovery." (Id. at pp. 873-874.)

(Javor v. Dellinger (1992) 2 Cal.App.4th 1258, 1262; West Coast Development v. Reed (1992) 2 Cal.App.4th 693, 702; Summers v. City of Cathedral City (1990) 225 Cal.App.3d 1047, 1071; Llamas v. Diaz, supra, 218 Cal.App.3d at p. 1048.) The former is an objective element and the latter is subjective. (Brewster v. Southern Pacific Transportation Co. (1991) 235 Cal.App.3d 701, 713.) The award of sanctions under Code of Civil Procedure section 128.5 rests in the sound discretion of the trial court. (Tenderloin Housing Clinic, Inc. v. Sparks (1992) 8 Cal.App.4th 299, 304.) If evidence exists to support the trial court's factual findings in support of the award, it will not be

disturbed unless it exceeds the bounds of reason. (West Coast Development v. Reed, supra, 2 Cal.App.4th at pp. 697-698.) "Where the issue on appeal is whether the trial court has abused its discretion, the showing necessary to reverse the trial court is insufficient if it presents facts which merely afford an opportunity for a different opinion[.]" (Brewster v. Southern Pacific Transportation Co., supra, 235 Cal.App.3d at p. 712, internal quotation marks omitted.)

In a 10-page order the trial court detailed its reasons for imposing sanctions. Krissman had contacted Cooke in response to a request by Jones and Cooke. Upon learning of the conversation, Scott

called Jones and asked why he had asked Krissman to call Cooke. Jones explained his concern that Cooke get a second opinion. Scott told Jones that Cooke had advised Scott he was completely satisfied with and confident in Scott and would not change lawyers. Scott then called Krissman's law firm and spoke with several of the partners. Each told Scott they had no knowledge of any conversation between Krissman and Cooke. When Krissman did not telephone Scott by the next day he filed this lawsuit. Without ever serving any written discovery on the law firm, Scott proceeded to depose every partner in the firm and Krissman's secretary. The depositions were noticed and held in San

Clemente, a two-hour drive from Krissman's Wilmington office. None of the deponents had any knowledge of the telephone call. At trial Scott testified he did not believe Cooke was going to switch lawyers but he filed his lawsuit to stop firms like Krissman's from rendering second opinions on cases. He testified that for the $150 filing fee, a lawsuit was a good way to get the defendant's attention, "It kind of prioritizes their calendar." He did not file suit to recover damages but to "teach the defendants a lesson." The trial court concluded it was apparent that before filing the lawsuit, not to mention before trial, Scott knew that his relationship with Cooke had not been disrupted, nor had

he been defamed. Indeed Scott resolved Cooke's litigation and collected over $1.5 million in legal fees. The evidence supports the trial court's conclusion that Scott's action was meritless and brought in bad faith.

Relying upon Lesser v. Huntington Harbor Corp., supra, 173 Cal.App.3d 922, Scott also contends he was denied an adequate opportunity to be heard on the issue of sanctions because the trial judge had already predetermined the issue of whether sanctions should be imposed and it would not allow him to fully present his argument. In Lesser following grant of a nonsuit, the trial court stated it would hold a hearing the next morning on "'the

issue of the amount of attorney fees to be awarded and costs against the [plaintiff] in this case.'" (Id. at p. 934.) At the hearing the court noted the only issue to be discussed was the amount of sanctions. It denied the plaintiff a continuance so it could present further evidence.

Here, upon granting nonsuit on January 14, the trial court stated, "the court ... tentatively finds from the evidence in this case that at least a hearing should be held on [§ 128.5 sanctions.]" The trial court may impose sanctions on its own motion after notice and opportunity to be heard. (Code Civ. Pro., § 128.5, subd. (c).) The parties were given until January 22 to file papers and a hearing was set for February

5. A lengthy court hearing was held not only on the propriety of imposing sanctions but on the amount.[3] Nothing in the record supports Scott's contention the trial court had already decided to award sanctions or that he was denied the opportunity to be heard. (See Brewster v. Southern Pacific Transportation Co., supra, 235 Cal.App.3d at p. 716.)

Finally, Scott contends there is insufficient evidence to support the amount of sanctions awarded. The sanctions award had three components: (1) legal fees paid

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[3] Scott also complains the court denied him the opportunity to present a witness. In the middle of argument Scott declared he would call one of Krissman's law partners to the stand to testify on the law regarding when an action is in bad faith. The trial court refused. There was no error in this. There was no offer of proof regarding the relevancy of the proposed testimony.

to the two law firms which had been retained to represent the Krissman firm; (2) professional time expended by Krissman and other members of his firm discussing strategy, attending depositions, responding to discovery, and attending trial and other court hearings; and (3) expert witness fees. Each attorney from the Krissman firm who expended time in the case submitted a detailed declaration specifying the time he or she spent on the case. Declarations specifying the amounts paid to the outside law firms were also submitted.

Scott argues the evidence is inadequate because there were no detailed itemized billing statements from which it can be determined whether the attorney fees

awarded were reasonable, but he points to no authority requiring such. In Martino v. Denevi (1986) 182 Cal.App.3d 553, in the context of an award of reasonable attorney fees under Civil Code section 1717 which the court reversed for lack of any supporting evidence, the court noted, "Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records." (Id. at p 559.)

That sanctions in other cases which have been affirmed by appellate courts have been for far lesser amounts has no bearing on whether the trial court abused its discretion in this case. We note that in

California Casualty Management Co. v. Martocchio (1992) 11 Cal.App.4th 1527, the court approved an award of $216,460 in attorney fees as section 128.5 sanctions because the lawsuit had been totally and completely without merit. (Id. at p. 1530.) The purpose of a sanctions award under section 128.5 is to compensate a party for the other's harmful conduct. (Tenderloin Housing Clinic, Inc. v. Sparks, supra, 8 Cal.App.4th at p. 307.) As recently noted in National Secretarial Service, Inc. v. Froehlich (1989) 210 Cal.App.3d 510, "It is perhaps time that the courts, both trial and appellate, begin to speak and react more forcefully with respect to cases such as this one. Such an

abuse of the legal system ... simply can no longer be tolerated. It is not fair to the opposing litigant who is victimized by such tactics and it is not fair to the greatly overworked judicial system itself and those citizens with legitimate disputes waiting patiently to use it. In those cases where such abuse is present, an award of substantial sanctions is proper." (Id. at p. 526, emphasis added, fn. omitted.)

We will not revaluate the evidence in this matter and interfere with the trial court's exercise of its discretion. (West Coast Development v. Reed, supra, 2 Cal.App.4th at p. 698.) The trial court reviewed the evidence in support of the sanctions award and made a determination of

what were reasonable costs and attorney fees. We will not interfere with its decision.

The judgment is affirmed.

Dated: December 28, 1993

WALLIN, J.

WE CONCUR:

MOORE, ACTING P. J.

SONENSHINE, J.

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

Division Three

SCOTT, C. BRENT
V.
KRISSMAN, JOEL
SILVER, MC WILLIAMS, STOLPMAN, MANDEL &
G012464
Orange County No. 583115

THE COURT:

The petition for rehearing is DENIED.

Dated: January 27, 1994

WALLIN, J.
Justice

We Concur:

H. MOORE, J.
Acting Presiding Justice

SONENSHINE, J.
Justice

Fourth Appellate District,
Division Three, No. G012464
S038094

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

C. BRENT SCOTT Et Al., Appellants

v.

JOEL KRISSMAN Et Al., Respondents

Petition for review DENIED.

Dated: April 20, 1994

LUCAS
Chief Justice

The State Bar of California
333 South Beaudry
9th Floor
Los Angeles, California 90017-1466

April 7, 1989

Brent C. Scott
2449 S. El Camino Real
San Clemente, CA 92672

Inquiry No: 89 3285
Respondent: Joel Krissman

Dear Mr. Scott:

This is to acknowledge receipt of you [sic] letter dated March 8, 1989.

The contentions raised by you deal with matters which are properly before a court of record which will make appropriate findings of fact and conclusions of law in the disposition of your case.

The respective positions of all of the parties should properly be presented to the court. If the court finds professional misconduct on the part of the attorney, it may refer the matter to our office for further investigation.

In view of the above, we are closing the file at this time. Thank you for bringing

this matter to the attention of the State Bar of California.

If you are not satisfied with the State Bar decision to close your complaint, you may request a review of our decision. Your request, which must be submitted in writing, will be considered by the Complainants' Grievance Panel.

Pursuant to Rule 513, Rules of Procedure of the State Bar of California, except upon a showing of good cause, your request for review must be received by the Administrative Compliance Unit within three months of the date of this letter.

Your written request should be directed to the Administrative Compliance Unit, Office of Investigations, State Bar of California, 333 South Beaudry, 9th Floor, Los Angeles, CA 90017.

Very truly yours,

Glen DeSargent
Special Investigator

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

C. BRENT SCOTT, an individual, and LAW OFFICES OF C. BRENT SCOTT, a Professional Corporation,	)	Case No. 583115
Plaintiffs,	)	ORDER DENYING MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF ISSUES (C.C.P. § 437c(g))
v.	)	
JOEL KRISSMAN, an individual, and SILVER, MCWILLIAMS, STOLPMAN, MANDEL & KATZMAN, a law partnership, and DOES 1 to 5, inclusive,	)	Hearing: January 10, 1991 Time: 11:00 a.m. Dept: 23
Defendants.	)	

The motion of the defendants, Joel Krissman and Silver, McWilliams, Stolpman, Mandel & Katzman, for summary judgment or, in the alternative, for summary adjudication of issues without substantial controversy, came on regularly for hearing on January 10, 1991 in Department 23 of the above-entitled court, Honorable Ronald L. Bauer, judge pro tempore, presiding. Plaintiffs C. Brent Scott and C. Brent Scott, a Professional Corporation, appeared through their attorney of record, C. Brent Scott. Defendants Joel Krissman and Silver, McWilliams, Stolpman, Mandel & Katzman appeared through their attorneys of record, Richards, Watson & Gershon, a Professional Corporation, by Mitchell E.

Abbott. The court having received the admissible evidence contained in the declarations and exhibits submitted by the parties, having read the briefs submitted by the parties, and having heard the oral argument of counsel, and having considered all of the same and being fully advised in the premises, it appears and the court now finds that the defendants' motion for issues without substantial controversy, must be denied, and the court makes the following determinations pursuant to Code of Civil Procedure Section 437c(g):

ISSUE NO. 1: The remarks made by defendant Joel Krissman to Allen W. Jones, Jr. and James D. Cooke were privileged

communications within the contemplation of Civil Code Section 47(3).

REASON FOR DENIAL OF MOTION AS TO ISSUE NO. 1: The court finds that defendants were interested parties within the contemplation of Civil Code Section 47(3) insofar as defendants were asked to render a "second opinion" regarding James Cooke's personal injury case. However, the motion is denied as to Issue No. 1 because based upon the record before the court at this time, there is a triable issue of fact as to whether Mr. Krissman made the remarks attributed to him, and as to whether the remarks attributed to Mr. Krissman, if made, were within the scope of what was asked for, namely, a "second opinion."

Evidence: Deposition of Joel Krissman, pages 68-73; Deposition of James D. Cooke, page 31.

ISSUE NO. 2: The remarks allegedly made by defendant Joel Krissman to Allen W. Jones Jr. and James D. Cooke either were true or were statements of opinion and thus not actionable.

REASON FOR DENIAL OF MOTION AS TO ISSUE NO. 2: The court finds that the separate statement of undisputed facts filed in support of the motion for summary judgment or, in the alternative, for summary adjudication of issues, does not assert or establish the terms or extent of the allegedly defamatory statements relied

upon by plaintiff, and the motion is denied as to Issue No. 2 on that ground.

ISSUE NO. 3: There is no evidence that defendant Joe Krissman made any of the remarks with malice and plaintiff is therefore not entitled to recover exemplary damages.

REASON FOR DENIAL OF MOTION AS TO ISSUE NO. 3: The court elects to exercise its discretion and to deny the motion as to Issue No. 3 pursuant to the provisions of Code of Civil Procedure Section 437c(e), which provides, in part, that "summary judgment may be denied in the discretion of the court, ... where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be

established solely by the individual's affirmation thereof."

ISSUE NO. 4: Defendants are entitled to judgment as a matter of law on the first cause of action ("intentional interference with contract").

ISSUE NO. 5: Defendants are entitled to judgment as a matter of law on the second cause of action ("disparagement").

ISSUE NO. 6: Defendants are entitled to judgment as a matter of law on the third cause of action ("defamation").

REASON FOR DENIAL OF MOTION AS TO ISSUE NOS. 4, 5, AND 6: The motion as to Issue Nos. 4, 5, and 6 is dependent upon Issue Nos. 1, 2, and 3 and is denied for

the reasons set forth as to Issue Nos. 1, 2, and 3.

EXPENSES OF CONTINUANCE: At the time the motion was originally called for hearing, on December 12, 1990, the plaintiff, at the court's invitation, requested a continuance, at the plaintiff's expense, in order to permit plaintiff time to file the response to the moving party's separate statement of undisputed facts as required by Code of Civil Procedure 437c(b). Defendants' counsel filed (under cover of a supplemental memorandum of points and authorities) a declaration, dated December 17, 1990, setting forth the costs incurred by reason of the continuance. The court finds that the

reasonable expenses of this continuance are the sum of $750.

The court having made the foregoing findings and determinations, now, therefore,

IT IS HEREBY ORDERED that the defendants' motion for summary judgment is DENIED and the defendants' alternative motion for an order specifying issues without substantial controversy is DENIED.

IT IS FURTHER ORDERED that plaintiffs shall pay to defendants, within 15 days after the date of this order, the sum of $750 as and for the expenses of the

continuance requested by plaintiffs on December 12, 1990.

Dated: January 18, 1991

RONALD L. BAUER
Judge of the
Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

C. BRENT SCOTT,	)	
	)	
Plaintiff,	)	CASE NO. 58-31-15
	)	
vs.	)	ORDER DENYING
	)	MOTIONS FOR
JOEL KRISSMAN,	)	SUMMARY JUDGMENT
et al.,	)	AND SUMMARY
	)	ADJUDICATION OF
Defendants.	)	ISSUES
	)	

The Court having taken the matter under submission on April 19, 1991 and having considered the papers and arguments of the parties, now rules as follows:

Defendants' Krissman and Silver, McWilliams, Stolpman, Mandel and Katzman motion for summary judgment is denied as the Court finds that material issues of

fact exist, as well as, a material fact exists as to the states of mind of defendants. For example, defendants assert:

"Issue Number 6: The statement, attributed to defendant Joel Krissman, that Joel Krissman allegedly told James Cook 'that no one had ever heard of the plaintiff' was an expression of opinion and therefore not actionable."

The Court finds that the issue of whether a statement is fact or opinion is an issue of law. (Gregory v McDonnel Douglas, (1976) 17 C 3d 396.)

The statement set forth in Issue Number 6 is not a statement of opinion under the criteria set forth in Gregory,

but one of fact.

Defendants also assert:

"Issue Number 11: The statement, attributed to defendant Joel Krissman, that Joel Krissman allegedly said that 'his firm has been working for the unions for 36 years' was substantially true and therefore not actionable."

The Court finds that defendants have not submitted any evidence to substantiate the truth of this statement (the relevancy of which is questionable but not addressed by defendants).

Defendants' motion for summary adjudication of issues is also denied as a

result of the January 1, 1991 amendments to Code of Civil Procedure sec. 437c(f).

Dated: April 29, 1991

HON. RICHARD LUESEBRINK
Judge of the
Superior Court

SUPREME COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

C. BRENT SCOTT, an individual, et al.	)	Case No. 58 31 15
Plaintiffs,	)	COURT ORDER RE SANCTIONS
vs.	)	PURSUANT TO CCP § 128.5;
JOEL KRISSMAN, An individual, et al.	)	RECITATION OF CONDUCT JUSTIFYING THE IMPOSITION
Defendants.	)	OF SANCTIONS

The above-captioned case was filed on February 24, 1989 by plaintiff, C. BRENT SCOTT, an attorney licensed to practice in the State of California, and his Professional Corporation, C. BRENT SCOTT, INC. a Professional Corporation. The case set forth three separate causes of action. The complaint pled causes of action for

defamation against C. Brent Scott, for business disparagement against C. Brent Scott, Inc., a professional corporation and for intentional interference with a contractual relationship, asserting that the defendants, and each of them, attempted to interfere with Scott's contract representing Mr. James Cook [sic--Cooke] who had been severely injured in an explosion accident in October of 1988.

The events that were testified to that led up to the filing of the complaint were as follows:

1. Sometime in February of 1989 the defendant law firm had a dinner/seminar with the Union of which Mr. James Cook was a member, the Local Pipe Fitters No. 250.

During that seminar/dinner Mr. Allen Jones, the union representative inquired of Mr. Krissman, a partner in the defendant law firm, whether he Mr. Krissman, could do a check on an attorney. Mr. Jones was concerned that his union member was not being represented the way union members are normally represented, and was concerned given the serious nature of the accident in which his member was involved.

2. A few days following the dinner/seminar Mr. Jones called Mr. Krissman and asked if he would check on C. Brent Scott, again stating that he had serious concerns that his union member was not getting proper representation in that Mr. Scott was not doing the normal things

that lawyers who represent seriously injured union member normally do, inter alia, come to the union hall and pick up the investigation that was accomplished by the union; interview eyewitnesses to the accident; and preserve evidence from the accident scene.

3. Mr. Krissman, pursuant to the request of Mr. Jones researched Martindale-Hubbell and found that Mr. Scott did not have an ability rating in the Martindale-Hubbell Publication, though he had been licensed to practice for 9 years; Mr. Krissman looked in O'Brien's Evaluator in each of the the [sic--ten] years it was published, and did not find Mr. Scott's name as having ever tried a jury trial on

behalf of either a plaintiff or a defendant; and Mr. Krissman talked to his many partners to see if anyone of his partners had ever heard of C. Brent Scott. All partners replied that no one had heard of Mr. Scott.

4. Mr. Krissman then called Mr. Jones and gave him exactly the information that he had learned, as set forth above in Paragraph 3.

5. Mr. Jones then telephoned James Cook at his home and indicated to Mr. Cook that he had the concerns set forth above. Mr. Jones further indicated that after his conversation with Mr. Krissman his concerns had not been alleviated. Mr. Jones then suggested to Mr. Cook that he, Mr. Jones,

have another lawyer call Mr. Cook.

6. Mr. Jones then called Joel Krissman and requested that Mr. Krissman call James Cook to render a second opinion. Mr. Jones informed Mr. Krissman that Mr. Cook, in fact, wanted a second opinion.

7. On February 21, 1989 Mr. Krissman contacted Mr. Cook via telephone to ask him if he had been contacted by Mr. Jones relative to Mr. Cook receiving a second opinion from another lawyer. Mr. Cook indicated that he had been in communication with Mr. Jones and was aware that he was going to be contacted by another lawyer.

8. During the conversation between Mr. Cook and Mr. Krissman, which lasted less than 15 minutes, an appointment was

made for Mr. Cook to see Mr. Krissman, in Mr. Krissman's office on February 24, 1989 at approximately 2 p.m. in the afternoon.

9. Following the telephone conversation between Mr. Cook and Mr. Krissman, Mr. Cook informed Mr. Scott of the telephone conversation. On February 22, 1989 Mr. Scott called Mr. Allen Jones, the union representative and asked Mr. Jones why he was having another lawyer call his client. Mr. Jones reiterated his concerns which are cited above relative to Mr. Scott's conduct concerning his representation of Mr. Cook. Mr. Cook informed Mr. Scott in his initial communication with him, concerning the communication between Mr. Krissman and Mr.

Cook, that he, Mr. Cook, was totally and completely satisfied with Mr. Scott's representation; that he had complete confidence in him; that he knew before he hung up the phone with Mr. Krissman that he was not going to go to the meeting nor was he going to change attorneys.

10. Also, on February 22, 1989 Mr. Scott contacted the defendant law firm and after speaking to Mr. Ed Silver was referred to Mr. Leonard Mandel the then managing partner of the firm. Mr. Mandel informed Mr. Scott that although he knew nothing of the phone call between Mr. Krissman and Mr. Cook that there must be a good reason for it, as Mr. Krissman is a very ethical and moral lawyer.

11. Mr. Scott filed his action in Orange County Superior Court on February 24, 1989, and had Mr. Krissman served at approximately 2 p.m. the time at which Mr. Krissman was to meet with Mr. Cook.

PLAINTIFFS' CONDUCT FOLLOWING THE FILING OF THE ABOVE-CAPTIONED CASE

Following the service of the lawsuit of February 24, 1989 Mr. Scott commenced taking the depositions of every partner in the defendant law firm, with one exception, at his office in San Clemente with full knowledge that the defendant law firm was based in Wilmington, California. The depositions of all were taken in the following order, Joel Krissman-May 12,

1989, San Clemente; Allen Jones-June 30, 1989, San Clemente; Leonard Mandel-December 1, 1989, San Clemente; Ed Silver-December 1, 1989, San Clemente; Tom Stolpman-January 31, 1990, Los Angeles; Mary Nelson Abbott-March 20, 1989, San Clemente; Eleanor Demler, Secretary to Mr. Joel Krissman-March 20, 1989, San Clemente; Donna Silver Frajnb-May 16, 1990, San Clemente; Bernard Katzman-May 16, 1990, San Clemente. None of the partners of the defendant law firm had any knowledge of the telephone conversation until the lawsuit was filed, with the exception of Mr. Silver who did not know anything about the matter and referred Mr. Scott to Mr. Mandel in his telephone call of February 22, 1989. In

addition, no interrogatories were propounded nor any informal discovery to determine whether each partner of defendant law firm had any relevant knowledge whatsoever.

During the course of the litigation, Mr. C. Brent Scott represented himself, and his law firm. He took all of the depositions set forth above. Further, during his deposition he failed to answer questions relative to his trial competence and was fined $1100.00 in sanctions for his willful refusal to enter into discovery. He was subsequently fined an additional $700.00 for discovery violations.

During the course of the case, it was assigned to Judge Lusebrink [sic--

Luesebrink], for all purposes. When the plaintiff became aware that Judge Lusebrink did not believe that plaintiff had a case, Mr. Scott indicated that he was going to file a challenge to Judge Lusebrink pursuant to C.C.P. § 170.6, notwithstanding the fact the case had been before Judge Lusebrink for many months, and further had at least two settlement conferences before Judge Lusebrink. Despite the fact that a CCP § 170.6 challenge would be untimely, Judge Lusebrink recused himself rather than having to deal with Mr. Scott. Thereafter, the case was assigned for all purposes to Department 80, the Honorable Jim Ross.

The matter was called to trial on January 2, 1992 and proceeded for six days.

During trial Mr. Scott testified that he had filed the lawsuit to "put a stop to the practices of the defendant law firm", "that it only cost $150.00 to file a lawsuit" and "it would prioritize the defendant law firm's calendar"; further that he "filed the lawsuit to get the attention of the defendants" and "that prior to filing the lawsuit he was fully aware that Mr. Allen Jones had recommended, suggested, and implored the defendant Joel Krissman to call Mr. Jim Cook".

Mr. Scott also filed a complaint with the State Bar of California and at the time he filed the complaint with the State Bar in March of 1989, he knew the reason Mr. Krissman had called Mr. Cook was because he

had been requested to and was told Mr. Cook wanted a second opinion. Mr. Scott having been informed of this by Mr. Allen Jones on February 22, 1989, was at all times during the pendency of the within litigation, aware that his client James Cook had complete confidence and trust in him and in fact Mr. Cook kept Mr. Scott as his attorney throughout the pendency of Mr. Cook's underlying litigation.

In addition, Mr. Scott was aware that in November of 1991 he had settled Mr. Cook's case for the sum of $5.2 million. Mr. Scott was also aware that he had collected $1,688,000.00 in attorneys' fees for representing Mr. James Cook in his action. Notwithstanding this information,

Mr. Scott continued to press his claim for intentional interference with the contractual relationship.

In addition to the above, Mr. Scott testified on direct examination conducted by an attorney employed in his office, he filed the lawsuit "not to recover damages, but to teach the defendants a lesson".

It was apparent that this lawsuit was filed for the purposes of insuring that the defendant law firm and the individual defendant would have no further contact with the plaintiff so as to insure that Mr. C. Brent Scott could continue to represent Mr. James Cook regardless of his competence or lack thereof. It is equally clear that Mr. Scott knew prior to ever filing his

lawsuit on February 24, 1989, and prosecuting said lawsuit, that he had not been defamed, that his law firm had not been disparaged and that he really did not have a contingency fee contract with the plaintiff. Assuming arguendo, that Mr. Scott had such a contingency fee contract with Mr. Cook, that it had not been interfered with at all.

It is for the foregoing reasons that this Court has awarded sanctions in the sum of $221,617.10 to the defendants' law firm and the individual defendant which figure represents defendants' attorneys' fees, costs incurred and reasonable and necessary allotment of time taken to defend this most frivolous, and unwarranted action.

The following is a list of attorneys' fees and costs as well as attorney time (defendant) which has been incurred in defending this frivolous action for almost three years.

1. Attorney fees and costs of Richard, Watson, & Gershon through October 19, 1991-$83,548.10.

2. Attorney fees of Baker, Silberberg & Keener through January 20, 1992-$67,625.00.

3. Attorney time of defendant Krissman-$14,250.00 (57 hrs. @$250.00/hr; includes deposition, trial attendance, travel, etc.)

Attorney time of defendant Stolpman-$24,626.00 (70 hrs. @$350.00/hr;

includes deposition, trial attendance, travel, etc.)

Attorney time of defendant Katzman-$3,250.00 (10 hrs. @$250.00/hr; includes deposition, trial attendance, travel, etc.)

Attorney time of defendant Elber-$3,250.00 (10 hrs. @$250.00/hr; includes strategy discussion, investigation and analysis, etc.)

Attorney time of defendant Silver-$2,500.00 (9 hrs. @$250.00/hr; includes legal research, deposition, travel, etc.)

Attorney time of defendant Abbott-$3,750.00 (15 hrs. @$250.00/hr; strategy, discussion, investigation,

administrative billings, deposition, travel, etc.)

Attorney time of defendant Mandel-$14,500.00.00 [sic] (See Declaration of Mandel, Esq.) (58 hrs. @$250.00/hr strategy discussion, deposition, own & plaintiffs, settlement conferences, trial attendance, etc.)

Expert fee of Bernie Martin-$1,250.00 (12 hrs. @$100.00/hr; expert opinioon [sic] re: risk management and handling, reputation of defendant firm).

TOTAL $218,299.10

It is ordered that in a separate document judgment be entered in favor of defendants Joel Krissman, an individual,

and Silver, McWilliams, Stolpman, Mandel & Katzman, a law partnership in the sum of $221,617.10.

Dated: February 13, 1992

JAMES R. ROSS, Judge
Orange County Superior Court